

13 January 1972

AIDE-MEMOIRE

The pending order of business for the Senate when it convenes 18 January will be S. 2515, Equal Employment Opportunities Enforcement Act of 1971, which contains a provision relating to Federal employees. The provision poses a number of problems, not the least of which concerns the possibility of a court contest concerning the Director's 102(c) authority for termination in the face of a charge that the termination was prompted by reason of discrimination on account of race, color, religion, sex or national origin.

Responsible staff members of the Senate Labor and Public Welfare Committee understand our position, support it, and have offered to push for an appropriate floor amendment. Of the several amendments proposed, they have selected one modelled substantially after a provision in the Civil Rights Act of 1964 which exempts from the equal employment opportunity enforcement provision of that Act contractor positions subject to a Federal security program.

The Committee staffers want assurance from us, preferably by Friday and not later than Monday, that responsible Civil Service Commission officials (either Bernard Rosen or Irving Kator) agree with our position.

S. 2515

EQUAL EMPLOYMENT OPPORTUNITIES
ENFORCEMENT ACT OF 1971

A. Problem

B. Proposed Amendment

C. Background Material:

(1) Section 717

(2) Executive Order 11478

(3) Exemption Precedents in Civil Rights Act of 1964

TAB

PROBLEM

Section 717 of S. 2515 essentially is an enactment of Executive Order 11478, Equal Employment Opportunity in the Federal Government, but unlike the Executive Order provides an alleged aggrieved applicant or employee with statutory appeal rights and raises at least the following problems:

(1) The enforcement authority of the Civil Service Commission and the remedies available to the aggrieved through court action could conflict with the Director's authority to terminate employment under section 102(c) of the National Security Act of 1947. To the extent the newer authorities prevailed there would be a dilution of the Director's 102(c) authority.

(2) Proceedings on complaints before either the Civil Service Commission on appeal or the district courts may necessarily involve the disclosure of information on Agency "organization, functions, names, official titles, salaries, or numbers of personnel employed" in conflict with section 6 of the CIA Act of 1949 and the Director's responsibility to protect intelligence sources and methods.

(3) The remedies available to aggrieved employees or applicants could be used to harass the Agency and its functioning, with ramifications similar in substance, if not in scope, to those we have associated with the so-called Ervin bill on constitutional rights of Federal employees.

(4) There may be a legitimate operational need that the assignment of personnel by the Agency not be free from discrimination based on race, color, religion, sex or national origin.

TAB

AMENDMENT

Proposed Floor Statement on Amendment

Mr. President:

There is also proposed a committee amendment to section 717 of the bill relating to personnel actions affecting Federal employees or applicants for employment. The committee amendment is patterned after language which has been in the Civil Rights Act of 1964 since its inception and like section 703(g) of the Act leaves unfettered the authority to make personnel determinations of a national security nature and resolves any potential conflict in the favor of national security interests.

Proposed Amendment to Section 717 of S. 2515

Page 66, line 5, add new subsection (f):

"SEC. 717. (f) Notwithstanding any other provision of this section, this section shall not apply to any personnel action if--

(1) the position involved is subject to a requirement imposed in the interest of the national security of the United States pursuant to any statute of the United States or any Executive order of the President; and

(2) the requirement has not been fulfilled as determined by the head of an executive agency as defined in section 105 of Title 5, United States Code, having discretionary authority to terminate the employment of the incumbent of the position whenever he shall determine such termination necessary or advisable in the interest of the United States or the national security."

TAB

1 (78 Stat. 265; 42 U.S.C. 2000e-14) is amended to read as
2 follows:

3 "SEC. 715. All authority, functions, and responsibilities
4 vested in the Secretary of Labor pursuant to Executive Order
5 11246, as amended, relating to nondiscrimination in employ-
6 ment by Government contractors and subcontractors and non-
7 discrimination in federally assisted construction contracts are
8 transferred to the Equal Employment Opportunity Com-
9 mission, together with such personnel, property, records, and
10 unexpended balances of appropriations, allocations, and
11 other funds employed, used, held, available or to be made
12 available in connection with the functions transferred to the
13 Commission hereby as may be necessary to enable the Com-
14 mission to carry out its functions pursuant to this section,
15 and the Commission shall hereafter carry out all such au-
16 thority, functions, and responsibilities pursuant to such
17 order."

18 SEC. 11. Title VII of the Civil Rights Act of 1964 (78
19 Stat. 253; 42 U.S.C. 2000e et seq.) is amended by adding
20 at the end thereof the following new section:

21 "NONDISCRIMINATION IN FEDERAL GOVERNMENT
22 EMPLOYMENT

23 "SEC. 717. (a) All personnel actions affecting em-
24 ployees or applicants for employment' (except with regard
25 to aliens employed outside the limits of the United States)

1 in military departments as defined in section 102 of title 5,
2 United States Code, in executive agencies (other than the
3 General Accounting Office) as defined in section 105 of title
4 5, United States Code (including employees and applicants
5 for employment who are paid from nonappropriated funds),
6 in the United States Postal Service and the Postal Rate
7 Commission, in those units of the Government of the District
8 of Columbia having positions in the competitive service, and
9 in the legislative and judicial branches of the Federal Gov-
10 ernment having positions in the competitive service, shall be
11 made free from any discrimination based on race, color, re-
12 ligion, sex, or national origin.

13 “(b) The Civil Service Commission shall have authority
14 to enforce the provisions of subsection (a) through appropri-
15 ate remedies, including reinstatement or hiring of employees
16 with or without back pay, as will effectuate the policies of this
17 section, and shall issue such rules, regulations, orders and
18 instructions as it deems necessary and appropriate to carry
19 out its responsibilities under this section. The Civil Service
20 Commission shall—

21 (1) be responsible for the annual review and ap-
22 proval of a national and regional equal employment
23 opportunity plan which each department and agency and
24 each appropriate unit referred to in section 717(a) shall

25 submit in order to maintain an affirmative program of
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1 *equal employment opportunity for all such employees*
2 *and applicants for employment;*

3 *(2) be responsible for the review and evaluation*
4 *of the operation of all agency equal employment oppor-*
5 *tunity programs, periodically obtaining and publishing*
6 *(on at least a semiannual basis) progress reports from*
7 *each such department, agency, or unit; and*

8 *(3) consult with and solicit the recommendations*
9 *of interested individuals, groups, and organizations re-*
10 *lating to equal employment opportunity.*

11 *The head of each such department, agency, or unit shall*
12 *comply with such rules, regulations, orders, and instructions*
13 *which shall include a provision that an employee or applicant*
14 *for employment shall be notified of any final action taken on*
15 *any complaint of discrimination filed by him thereunder. The*
16 *plan submitted by each department, agency, and unit shall*
17 *include, but not be limited to—*

18 *(1) provision for the establishment of training and*
19 *education programs designed to provide a maximum op-*
20 *portunity for employees to advance so as to perform at*
21 *their highest potential; and*

22 *“(2) a description of the qualifications in terms of*
23 *training and experience relating to equal employment*

24 *opportunity for the principal and operating officials of*

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25 *each such department, agency, or unit responsible for*

1 carrying out the equal employment opportunity program
2 and of the allocation of personnel and resources pro-
3 posed by such department, agency, or unit to carry out
4 its equal employment opportunity program.

5 “(c) Within thirty days of receipt of notice of final
6 action taken by a department, agency, or unit referred to in
7 subsection 717(a), or by the Civil Service Commission upon
8 an appeal from a decision or order of such department,
9 agency, or unit on a complaint of discrimination based on
10 race, color, religion, sex or national origin, brought pursuant
11 to subsection (a) of this section, Executive Order 11478
12 or any succeeding Executive orders, or after one hundred
13 and eighty days from the filing of the initial charge with the
14 department, agency, or unit or with the Civil Service Com-
15 mission on appeal from a decision or order of such depart-
16 ment, agency, or unit until such time as final action may
17 be taken by a department, agency, or unit, an employee or
18 applicant for employment, if aggrieved by the final disposition
19 of his complaint, or by the failure to take final action on his
20 complaint, may file a civil action as provided in section 706
21 (q), in which civil action the head of the department, agency,
22 or unit, as appropriate, shall be the defendant.

23 “(d) The provisions of section 706(q) through (w),
24 as applicable, shall govern civil actions brought hereunder.

1 *Government agency or official of its or his primary respon-*
2 *sibility to assure nondiscrimination in employment as re-*
3 *quired by the Constitution and statutes or of its or his respon-*
4 *sibilities under Executive Order 11478 relating to equal*
5 *employment opportunity in the Federal Government.*

6 *SEC. 12. Section 716 of the Civil Rights Act of 1964*
7 *(42 U.S.C. 2000(e)-15, 78 Stat. 266) is amended by*
8 *adding at the end thereof the following new subsection:*

9 *"(d) In the performance of their responsibilities under*
10 *this Act, the Attorney General, the Chairman of the Civil*
11 *Service Commission and the Chairman of the Equal Em-*
12 *ployment Opportunity Commission shall consult regarding*
13 *their rules, regulations, and policies."*

14 *SEC. 13. The amendments made by this Act to section*
15 *706 of the Civil Rights Act of 1964 shall not be applicable*
16 *to charges filed with the Commission prior to the enactment*
17 *of this Act.*

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

SEC. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

SEC. 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Order.

SEC. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or na-

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tional origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.)

SEC. 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

SEC. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

SEC. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.



THE WHITE HOUSE,
August 8, 1969.

CIVIL RIGHTS ACT OF 1964

Title VII

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SEC. 703

religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ an individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-

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SEC. 703. front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(e) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in compari-